

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB Docket No. 42113**

**ARIZONA ELECTRIC POWER COOPERATIVE, INC.  
v.  
BNSF RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY**

**MOTION OF DEFENDANT BNSF RAILWAY COMPANY  
REGARDING THE BOARD'S CONSIDERATION OF THE AVERAGE  
TOTAL COST REVENUE ALLOCATION METHODOLOGY**

At the oral argument held in this proceeding on September 28, 2010, Defendant BNSF Railway Company ("BNSF") advised the Board that the Board's use of the modified Average Total Cost methodology to allocate revenues on cross-over traffic in stand-alone cost ("SAC") analyses was recently remanded by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") to the Board in *BNSF Ry. Co. v. STB*, 604 F.3d 602 (D.C. Cir. 2010), *reh'g en banc denied*, No. 09-1092 (Sept. 2, 2010) (per curiam). BNSF also requested that the Board refrain from ruling in this case on the merits of the modified Average Total Cost methodology and allow that issue to be resolved in *Western Fuels Ass'n & Basin Elec. Power Coop. v. BNSF Ry.*, STB Docket No. 42088 ("*WFA/Basin*"), where the issue will be decided based on a full record. BNSF reiterates that request in this motion, which is being filed under 49 C.F.R. §1117.1. The grounds for this motion are set out in more detail below.

**BACKGROUND**

In *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1) (STB served Oct. 30, 2006) ("*Major Issues*"), the Board adopted the Average Total Cost ("ATC") methodology to allocate revenues on cross-over traffic between the stand-alone railroad ("SARR") and the

residual defendant. A year later, on September 10, 2007, the Board issued a decision in the *WFA/Basin* case in which, among other things, the Board stated that it had found a flaw in the ATC methodology and adopted a modified ATC methodology. *WFA/Basin*, slip op. at 14 (STB served September 10, 2007). While the Board's September 2007 *WFA/Basin* decision did not find the challenged rates to exceed reasonable maximum rates, the Board subsequently reopened the record to allow WFA/Basin to file new SAC evidence. On February 17, 2009, the Board issued its decision on reopening and found, contrary to its prior decision in the case, that the challenged rates exceeded reasonable maximum rates. The Board's SAC calculations in the new decision were made using its modified ATC methodology. BNSF appealed the Board's February 17, 2009 decision to the D.C. Circuit and challenged, among other things, the Board's use of the modified ATC methodology. In a decision issued on May 11, 2010, the D.C. Circuit remanded the February 2009 *WFA/Basin* decision to the Board because the Board had failed to consider BNSF's argument that modified ATC improperly double-counted variable costs.<sup>1</sup>

While BNSF's appeal of the *WFA/Basin* decision was pending before the D.C. Circuit, the parties in this case filed their SAC evidence and argument. In their reply evidence, defendants noted that the validity of the Board's modified ATC methodology was on appeal in the *WFA/Basin* case. Joint Reply Evidence and Argument of Defendants BNSF Ry. Co. & Union Pac. R.R. Co. at III.A-50 & n.94 (filed May 7, 2010). Since no decision had been reached in that appeal, defendants presented their SAC results using the modified ATC methodology, which was the approach used by complainant Arizona Electric Power Cooperative, Inc. ("AEPCO") in its opening evidence. However, defendants included in their electronic workpapers revenue calculations based on the Board's original ATC methodology and

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<sup>1</sup> BNSF's request for a rehearing of the D.C. Circuit's May 11, 2010 decision on other grounds was denied on September 2, 2010.

defendants urged the Board to apply its original ATC methodology in making the SAC calculations in this case.<sup>2</sup> While the D.C. Circuit issued its remand decision in the *WFA/Basin* case before AEPCO filed its rebuttal evidence, AEPCO said nothing about the ATC issue in its rebuttal filing.

## ARGUMENT

In *WFA/Basin*, the Board ordered the “single largest reduction in rail rates ever ordered by this agency.” *WFA/Basin*, slip op. at 2 (STB served February 17, 2009). An important factor contributing to this unprecedented result was the Board’s use of modified ATC to allocate revenue on cross-over traffic, which BNSF believes introduced significant bias into the SAC analysis, contrary to the Board’s goal in adopting ATC, which was to achieve an unbiased allocation of revenues on cross-over traffic. Because of the importance of the revenue allocation issue in that case, BNSF addressed the issue extensively in the evidence and argument before the Board and in the appeal of the Board’s decision to the D.C. Circuit. As a result of the D.C. Circuit’s remand of the *WFA/Basin* decision, the record on the validity of modified ATC will be further developed on remand in that case. The Board should resolve the issue of whether it could

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<sup>2</sup> Defendants submitted SAC evidence and electronic workpapers based on three SARR configurations and the original ATC calculations correspond separately to the three configurations. See “BNSF Intermodal ATC Summary Reply.xlsx,” “BNSF General Freight ATC Summary Reply.xlsx,” “BNSF Coal ATC Summary Reply.xlsx” (ANR); “UP ATC Summary Sc 2.xlsx,” “BNSF Intermodal ATC Summary Sc 2.xlsx,” “BNSF General Freight ATC Summary Sc 2.xlsx,” “BNSF Coal ATC Summary Sc 2.xlsx,” “UP Coal ATC Summary PRB.xlsx,” “Stratford Vaughn ATC.xlsx” (ANR-PRB); and “UP ATC Summary Sc 3.xlsx,” “BNSF Intermodal ATC Summary Sc 3.xlsx,” “BNSF General Freight ATC Summary Sc 3.xlsx,” “BNSF Coal ATC Summary Sc 3.xlsx,” “UP Coal ATC Summary NM.xlsx”, and “BNSF Belen Rincon ATC.xlsx” (ANR-NM). See also the following electronic workpapers from AEPCO’s opening evidence: “UP ATC Summary.xlsx,” “UP Coal ATC Summary.xlsx,” and “Joint\_UP-BNSF ATC.xlsx”

permissibly depart from original ATC adopted in *Major Issues* based on the fully developed record in the *WFA/Basin* case.

The choice of ATC or modified ATC was not an issue that was addressed in detail in the filings in this case. AEPCO's opening evidence used modified ATC, relying on precedent. Opening Evidence of Complainant Arizona Elec. Power Coop., Inc., at III-A-32 (filed Jan. 25, 2010). And since BNSF's appeal in *WFA/Basin* had not yet been decided, defendants argued in their reply evidence that original ATC should be applied and provided the relevant revenue data in the electronic workpapers but they presented the SAC results using modified ATC. AEPCO did not address the issue at all in its rebuttal filing even though the D.C. Circuit had issued its remand decision in *WFA/Basin*. The record in this case does not include a full exposition of the ATC issue.

Moreover, the choice between ATC and modified ATC is unlikely to make any difference in the outcome of this case. As was evident at the oral argument, the parties have fundamental differences on other issues regarding the implementation of the SAC test that will likely determine the outcome of this case. If it turns out that the choice of ATC or modified ATC makes no difference in the SAC results, the Board does not need to, and should not, address in its decision in this case the proper approach to allocating revenue on cross-over traffic.

To ensure that the validity of the Board's modified ATC methodology is addressed in the *WFA/Basin* case where the record will be fully developed, BNSF therefore requests that before the Board issues a decision in this case, the Board determine whether the choice of ATC or modified ATC makes any difference in the outcome of the case. If the Board determines that the choice of revenue allocation methodology does not make a difference, BNSF requests that the

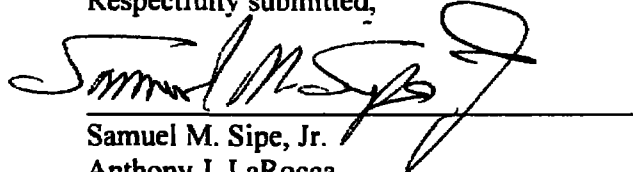
Board make it clear that the Board is not taking any position on the relative merits of ATC or modified ATC because the choice of methodology makes no difference in the results.

If, on the other hand, the Board determines that the choice of revenue allocation methodology would have an impact on the results of this case, BNSF requests that the Board hold this case in abeyance until the issue has been resolved in *WFA/Basin*. This approach would ensure that the issue of whether it was permissible for the Board to depart from its ATC methodology in allocating revenue on cross-over traffic will be resolved based on a full record.

### CONCLUSION

For the reasons set out above, BNSF respectfully requests that before the Board issues a decision in this case, the Board should determine whether the use of ATC or modified ATC makes any difference in the results. If the revenue allocation methodology does make a difference, which BNSF believes is unlikely, then the Board should hold this case in abeyance until it decides the revenue allocation issue in the *WFA/Basin* case.

Respectfully submitted,



Samuel M. Sipe, Jr.  
Anthony J. LaRocca  
Linda S. Stein  
STEPTOE & JOHNSON LLP  
1330 Connecticut Avenue, N.W.  
Washington, DC 20036  
(202) 429-3000

Richard E. Weicher  
Jill K. Mulligan  
BNSF RAILWAY COMPANY  
2500 Lou Menk Drive  
Fort Worth, TX 76131  
(817) 352-2353

ATTORNEYS FOR  
BNSF RAILWAY COMPANY

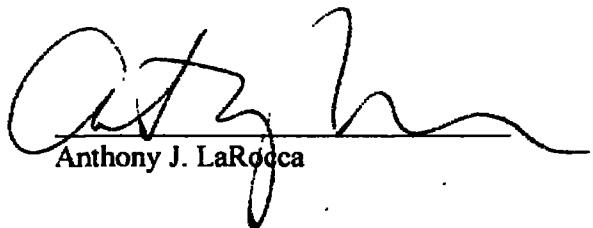
October 18, 2010

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 18th day of October, 2010, I caused a copy of the foregoing  
to be served on the following Parties of Record:

William L. Slover  
Robert D. Rosenberg  
Christopher A. Mills  
Daniel M. Jaffe  
Slover & Loftus  
1224 Seventeenth Street, N.W.  
Washington, D.C. 20036

Michael L. Rosenthal  
Carolyn F. Corwin  
COVINGTON & BURLING LLP  
1201 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
(202) 662-6000



Anthony J. LaRocca